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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY L. COOPER,

Defendant and Appellant.

C042178

(Super. Ct. No.
01F03110)

A jury convicted defendant Randy L. Cooper of possessing methamphetamine for sale. (Health & Saf. Code, § 11378.) He was placed on five years' probation with various conditions, including that he serve a year in the county jail.

On appeal, defendant contends (1) the trial court abused its discretion by permitting the prosecutor to introduce evidence of his prior arrest for possession of methamphetamine, and (2) the giving of CALJIC No. 2.11.5 combined with certain statements of the prosecutor during closing argument amounted to reversible error. We shall affirm the judgment.

BACKGROUND

During a search following a traffic stop on April 10, 2001, defendant was found in possession of \$1,550 in cash and a folded piece of paper containing what appeared to be a recipe for making "speed," i.e., methamphetamine.

When officers searched defendant's residence later that day, they found surveillance cameras posted along the perimeter of the house and connected to a television inside. In a small room about ten feet square in size, they discovered a heart-shaped box containing a plastic baggie with 1.4 ounces of methamphetamine. In a dresser drawer, they found a dirty sock containing \$3,000 in twenty-dollar bills. An open bottle of "VitaBlend," a powder commonly used as a cutting agent for methamphetamine, and a plastic box containing a glass narcotic smoking pipe were found in the kitchen area. In a passageway that led into the laundry room, there was a two-inch gap or "lip" connecting the floor of one room to the other. Wedged into the lip was a black pouch containing two electronic weighing scales. A box containing 50 new hypodermic syringes, wrapped in plastic baggies, was found in a closet area of the southeast bedroom of the house. In the front living room at a computer desk, officers found an electronic scanning device capable of monitoring police radio transmissions.

The search of a storage locker rented by defendant revealed unopened boxes of new stereo equipment bought at Fry's Electronics. A Fry's employee testified that defendant made three purchases of electronic equipment totaling over \$2,000 during the previous month. Defendant paid cash for all of the items.

Evidence showed that defendant receives \$770 per month in Social Security disability payments. At the end of April 2001, he had \$309.30 in his bank account. Under Social Security rules, defendant would lose his right to monthly payments if his bank balance exceeds \$2,000.

Based upon the items recovered from defendant's residence, an expert on narcotics transactions opined that the methamphetamine seized from defendant's house was possessed for purposes of sale.

Defendant testified that he had been renting the house for 12 years. According to defendant, various persons, including his girlfriend Virginia Azevedo, were living at the house off and on. All of them, except Azevedo, paid him nominal amounts of rent. Defendant shared the same bedroom with Azevedo. She possessed hypodermic needles because she is a diabetic. Defendant kept surveillance cameras around the house for "security reasons." He acknowledged that he had used methamphetamine "years ago" but said he was not currently using the drug. He denied all knowledge of the baggie of methamphetamine, the VitaBlend, and the scales found at his residence.

A friend testified that he lent defendant \$5,000 in cash in 2000, so defendant could purchase a house.

Azevedo was called as a defense witness, but she invoked her Fifth Amendment privilege and refused to answer questions about the items found in defendant's house.

DISCUSSION

I

Prior to trial, the prosecutor moved to introduce evidence of defendant's four arrests and two misdemeanor convictions for possessing methamphetamine, spanning the years 1988 to 1998. The prosecutor argued the evidence was admissible to prove the element of defendant's knowledge of the narcotic character of the substance. Defendant countered that his prior brushes with the law were "irrelevant to prove any disputed fact" and constituted inadmissible character evidence prohibited by Evidence Code section 1101. (Further section references are to the Evidence Code.)

The trial court ruled the evidence was admissible, noting "[k]nowledge is an element of the offense charged in this case, [and] it is in fact in controversy in this trial." The court also found the prior methamphetamine offenses were more probative than prejudicial under section 352, but limited the prosecutor to using only one of the prior incidents to show knowledge.

The prosecutor introduced evidence showing that a search of defendant's car in 1996 revealed that he was in possession of a baggie containing a white powdery substance which tested positive for methamphetamine.

Defendant contends the trial court abused its discretion in allowing this evidence. He claims that it was nothing more than bad character evidence made inadmissible by section 1101, subdivision (a), which states: "Except as [otherwise] provided [by statute], evidence of a person's character or a trait of his

or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Defendant discounts the trial court's rationale that the incident was relevant to show knowledge. In his view, there was no "genuine dispute" over the narcotic character of the substance found in his home, knowledge was not "in issue" in the case and, thus, the evidence did not fall within the exception set forth in section 1101, subdivision (b) (hereafter section 1101(b)). He is wrong.

Section 1101(b) allows the introduction of other crimes evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [defendant's] disposition to commit such an act."

In a prosecution alleging the unlawful possession of a controlled substance for sale, the People must prove that the accused possessed the contraband with the intent of selling it *and* with knowledge of both its presence and illegal character. (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) Thus, as the jury was correctly instructed in this case, one of the elements of the crime of possessing methamphetamine for sale is that the accused knew of its presence and "knew of its nature as a controlled substance."

Here, defendant denied knowledge not only of the presence of methamphetamine, but also of the other items found throughout

defendant's house that were associated with the sale of the drug. The fact he previously had been arrested with methamphetamine in his possession showed his familiarity with the narcotic nature of the drug, thereby tending to prove his knowledge that the powdery substance found in his residence was contraband. (*People v. Ellers* (1980) 108 Cal.App.3d 943, 952-953; *People v. Pijal* (1973) 33 Cal.App.3d 682, 691.)

Defendant asserts that "California courts are split" over whether it is error to admit evidence of prior narcotics activity to show the element of knowledge where there is no "genuinely controverted issue[]" as to whether defendant knew of the narcotic nature of the substance. He cites two cases, *People v. Perez* (1974) 42 Cal.App.3d 760 and *People v. Anderson* (1970) 6 Cal.App.3d 364, for the proposition that it is error to admit such evidence unless the defendant disputes knowledge as an issue. To the extent those cases stand for this proposition, they are no longer viable authority in light of more recent decisional authorities.

The California Supreme Court has held that, for purposes of determining the admissibility of evidence under section 1101(b), a plea of not guilty places all of the elements of the offense in dispute, "'unless the defendant has taken some action to narrow the prosecution's burden of proof.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4, quoting from *People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) There is no requirement that a defendant dispute the element of knowledge before a prosecutor may introduce relevant evidence on the issue. (*People v. Ellers, supra*, 108 Cal.App.3d at p. 953.) Therefore, the "'prosecution's burden to

prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69 [116 L.Ed.2d 385, 397].)

In *People v. Thornton* (2000) 85 Cal.App.4th 44 (hereafter *Thornton*), the appellant was stopped by a police officer who found a small bindle of tar heroin in appellant's car. Like defendant here, appellant's sole defense to the possession charge was that the bindle did not belong to him. (*Id.* at p. 47.) His attorney unsuccessfully sought to preclude evidence of prior heroin use by offering to forego the argument that defendant did not know the bindle contained a controlled substance.

Thornton rejected the notion that the defense could prevent the prosecution from introducing proof on an element of its case through such an offer. "[W]e [are not] prepared to revert to the outmoded notion that a criminal defendant may limit the prosecution's evidence by 'not putting things at issue.' . . . '[A] fact . . . becomes "disputed" when it is raised by a plea of not guilty or a denial of an allegation. . . . Such a fact remains "disputed" until it is resolved.'" (*Thornton, supra*, 85 Cal.App.4th at pp. 48-49.) Indeed, *Thornton* pointed out the general rule that the prosecutor is not compelled to accept a stipulation if it would deprive the People of the right to introduce persuasive and forceful evidence on an element of the crime. (*People v. Scheid* (1997) 16 Cal.4th 1, 17; *Thornton, supra*, 85 Cal.App.4th at p. 49.)

Here, defendant did not even offer to stipulate that he knew of the narcotic nature of the substance. Because the knowledge element was placed in issue by his plea of not guilty, he cannot complain that the trial court erred in admitting probative evidence on the issue by the mere fact that he failed to contest it.

Nor are we persuaded by defendant's backup argument that the court abused its discretion in not excluding the evidence pursuant to section 352. A discretionary decision will not be disturbed on appeal absent "a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125.) As noted, the issue of knowledge was a vital component of the prosecutor's burden of proof. On the other hand, the prejudicial effect of the incident which had not resulted in a conviction was relatively minor. And the trial court excluded *five* other prior incidents showing methamphetamine possession, thereby considerably lessening the prejudicial impact of the 1996 incident. There was no abuse of discretion.

In any event, it is not reasonably probable that defendant would have obtained a more favorable result if the trial court had excluded evidence of the 1996 incident. Defendant offered no sensible explanation for why he was carrying around in his wallet a document entitled "Speed, Method 2," with a list of ingredients. Defendant's possession of large amounts of cash was consistent with drug trafficking and inconsistent with his status as a recipient of Social Security disability, possessing a mere

\$300 in savings. His house was stocked with items carrying all the attributes of a classic drug operation--electronic scales, a cutting agent, large quantities of small currency, plastic baggies, syringes, and police monitoring equipment--many of which were cleverly hidden. Defendant's claim of ignorance and attempt to attribute ownership of the items to transient "subtenants" was weak and lacking in plausibility. In short, this case was not close and defendant was not prejudiced by evidence of the 1996 incident.

II

Evidence showed that Virginia Azevedo, defendant's girlfriend, had access to the methamphetamine found in the bedroom she shared with him--an inference that drew strength from the fact the illicit drug was found in a heart-shaped box among cosmetics and other female items. This inference was underscored when Azevedo was called to testify and invoked her privilege against self-incrimination.

Without objection, the trial court gave CALJIC No. 2.11.5 as follows: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether she has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial."

During closing argument, the prosecutor argued that defendant and Azevedo jointly possessed the methamphetamine found in the bedroom. He continued: "It's important at this point, and the Court will instruct you on this that evidence that another person, Virginia Azevedo, *may in addition to the defendant be responsible, criminally liable perhaps,* involved in the crime for which the defendant is on trial cannot enter into your discussions or your deliberations in any way. [¶] She is not being prosecuted in this trial. *So her guilt in addition to the defendant is not something for you to decide in this case.*" (Italics added.)

Defendant argues the giving of CALJIC No. 2.11.5, combined with the prosecutor's improper argument, misled the jurors into believing they could not consider Azevedo's criminal liability in resolving the question of whether the prosecution had proved his guilt. We disagree.

Defendant's claim that CALJIC No. 2.11.5 is inaccurate or misleading already has been rejected by the California Supreme Court, which concluded the instruction "'accurately states the law' and is therefore not misleading." (*People v. Hines* (1997) 15 Cal.4th 997, 1052, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 919; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant's suggestion that the instruction was misleading in combination with the prosecutor's closing argument also fails. An instruction that is a correct statement of law is not rendered infirm by virtue of the argument of counsel. The jurors were advised that statements of counsel are not evidence. They also

were told that if anything said by the attorneys during argument conflicted with the law as set forth in the instructions, the jurors were to follow the instructions. We presume the jury abided by these admonitions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

As for the claim of prosecutorial misconduct, defendant has waived the point by failing to raise it in the trial court. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447; accord, *People v. Frye* (1998) 18 Cal.4th 894, 969-970.) To the extent the prosecutor misspoke when he indicated the jurors could not consider Azevedo's guilt *in addition* to defendant's, an admonition to the jury could have cured any erroneous impression.

In any event, the prosecutor's comment was harmless. Defense counsel quickly dispelled any notion left by the prosecutor that Azevedo's guilt could not be considered. In defense counsel's words to the jury: "The prosecutor misstated this instruction during his argument when he told you that you are not to consider her [Azevedo's] guilt. Please carefully read this instruction. You will be given it. . . . This instruction does not say that you are not to consider the guilt of Virginia Azevedo as the actual perpetrator of the crime. [¶] . . . This instruction is only requiring that you not consider why she is not on trial here today." This remark, which was a correct statement of law (*People*

v. Farmer, supra, 47 Cal.3d at p. 918), was not contested by the prosecutor in his rebuttal argument.

Moreover, consideration of Azevedo's responsibility was expressly permitted by CALJIC No. 12.01 which, as given here, told the jurors that "[o]ne person may have possession alone, or two or more persons together may share actual or constructive possession."

Finally, both the prosecutor's and defense counsel's arguments accepted, as a given, that Azevedo possessed the methamphetamine found in the heart-shaped box. The only real disagreement was whether she and defendant possessed it together or whether it belonged solely to Azevedo.¹

¹ The prosecutor remarked: "Now it's also important to note here an instruction says this: One person may have possession alone, constructive possession or two people may jointly possess something in a constructive possession manner. [¶] . . . [¶] If you have a spouse or a significant other, and you guys share a car in common, you both may have a key to that car, or there may only be one key to the car, but you both may have access to that one key for the car. [¶] . . . [¶] That illustrates in an everyday way how two people can jointly, constructively possess one thing. And that's significant in this case because here, the defendant constructively possessed the methamphetamine[] found in his room and constructively possessed it with Virginia Azevedo, his girlfriend."

Defense counsel countered: "It's painfully obvious about that bag of methamphetamine is that it was in the possession of Virginia Azevedo. [¶] Virginia was actually in the house with the bag of methamphetamine when the police arrived. The methamphetamine was found on the shelves that were -- that had exclusively her possessions in them." Later, defense counsel argued: "Is it reasonable to believe that Virginia Azevedo had a small amount of methamphetamine on her nightstand? Is it reasonable to believe that she had this amount that a single user can use in one day? And that she kept it in her bedroom on the shelf, where she keeps all of her other personal

Having reviewed the entire record, we conclude no reasonable juror would have understood the prosecutor's comments to mean that Azevedo's criminal liability could not be considered in assessing the charges against defendant. (See *People v. Sully* (1991) 53 Cal.3d 1195, 1218-1219; *People v. Carrera* (1989) 49 Cal.3d 291, 313.) Accordingly, defendant's claim of prejudicial misconduct fails.

DISPOSITION

The judgment affirmed.

_____, SCOTLAND, P.J.

We concur:

_____, NICHOLSON, J.

_____, ROBIE, J.

belongings? Not only is it reasonable, but it is the most reasonable explanation."